

### Campoy, cont.

- Allowing such restrictions on vocabulary in DUI cases would lead to "creative wordsmithing and invite perpetual and unnecessary litigation."
- Could cause testimony to take an "unnatural tone" as witnesses attempt to sidestep prohibited terms.
- Such restrictions would place an unnecessary burden on both parties & would be transparent to jury.

---

---

---

---

---

---

---

### Can't Refer to the DRE as "Expert"

- "Drug Recognition Expert" is pervasive throughout published opinions
- These are proper words for describing these officers.
- Officer is a qualified DRE
- Published opinions using the words Drug Recognition Expert include: *State v. George*, 233 Ariz. 400 (App. 2013); *State v. Flannigan*, 194 Ariz. 150 (App. 1998); *State v. Boyd*, 201 Ariz. 27 (App. 2001); *State v. Hammonds*, 192 Ariz. 528 (App. 1998); *State v. Reyes*, 238 Ariz. 575 (App. 2015).

---

---

---

---

---

---

---

HGN

---

---

---

---

---

---

---

## HGN Does Not Measure Impairment

- Defense Claim: no scientific basis for testimony that HGN "cues" are related to/indicate impairment.
- Studies only relate HGN to a BAC above a certain level.
- Testimony suggesting observed "cues" are indicators of impairment should be precluded.
  - › Remember *Campoy* (wordsmithing)

---

---

---

---

---

---

---

## Suppress HGN Impairment Testimony

- Legal authority?
- Historically, HGN admissible without blood/breath results. *State ex rel. Hamilton v. City Court (Lopresti, RPI)*, 165 Ariz. 514 (1990).
- HGN results can be used to "show a symptom or clue of impairment." *Lopresti*, at 517.

---

---

---

---

---

---

---

## HGN & Impairment

- Caused by the DID drugs
  - › Demonstrates they are actively affecting the person at that time
  - › *Miller* – we only have to show impairment to the person
- 4 or more cues indicates .08 or greater BAC
  - › Presumptions
  - › Science

---

---

---

---

---

---

---

## Preclude Officer's HGN Accuracy

---

---

---

---

---

---

---

## Officer's HGN Accuracy

- What is the objection? (Must be specific)
- No case, rule, or statute prohibits
- *State v. Cook*, 172 Ariz. 122, (App. 1992) allows it
- Goes to credibility & weight of the evidence

---

---

---

---

---

---

---

## Officer's Accuracy on HGN

- Is part of Rule 702 foundation
  - > c) The testimony is the product of reliable principles and methods
  - > d) The expert has reliably applied the principles and methods to the facts of the case
- If the defense challenges HGN in any way, it places the officer's accuracy in issue

---

---

---

---

---

---

---

## What if Defendant Claims Natural Nystagums?

- Criminal Procedure Rule 15.2(a)(8)

---

---

---

---

---

---

---

FSTs

---

---

---

---

---

---

---

## General Attacks

- Non-standardized FSTs should be suppressed
  - › Not validated/scientific
- The officer did not give them in the suspect's native language
- Officer instructed incorrectly
- Defendant is not a proper candidate
  - › Too old
  - › Too heavy
  - › Wrong shoes

---

---

---

---

---

---

---

## Defense FST Arguments Do Not Support Suppression

- Legal authority for suppression?
  - › Rule 702 does not apply to FSTs other than HGN. *State v. Superior Court (Blake, RPI)*, 149 Ariz. 269 (1986).
- No opinion suggests non-validated FSTs are not admissible (same for other issues)
- Classic weight not admissibility issue

---

---

---

---

---

---

---

## Campoy, again

- FSTs are relevant & generally admissible in a DUI case as evidence of impairment. *Campoy*, at 134 - 35.
- Any lack of perfection in the FSTs used goes to weight, not the admissibility. *Campoy*, at 134 - 35.
- So does the fact that several factors other than alcohol impairment can lead to a cue of impairment on an FST. *Campoy*, at 136.

---

---

---

---

---

---

---

"Thus, the proper method for challenging FST deficiencies is testimony . . . calling these deficiencies to the attention of the jury and presenting evidence that cues of impairment were caused by something other than alcohol impairment."

---

---

---

---

---

---

---

## Non-Standardized FSTs

- Point out are used/approved by:
  - Officer's department
  - Agencies throughout the state/country
- Officer was trained to use them and has found them to be reliable.
- Finger to Nose & Rhomberg are used in DRE protocol
  - Extensively Studied
- FSTs are older than NHTSA
- Common sense

---

---

---

---

---

---

---

## Language Issues

- Point to facts indicating defendant understood FST instructions
- Language won't affect parts of the tests (HGN, balance, etc.)
- Issue is - Did Defendant understand?
  - Question of fact for fact finder

---

---

---

---

---

---

---

## SFST Validation Studies

- Validation is for above .08/.10
- Cannot use this way in AZ. *Albrecht* (Williams, RPI), 168 Ariz. 128 (App. 1991).
- NOT a basis to suppress W&T or OLS (>65; overweight, etc.)
  - 1) *Albrecht*
  - 2) Rule 702 does not apply - *Blake*
  - 3) Don't need studies for impairment – its common sense

---

---

---

---

---

---

---

## Studies That Responded To Common Ploys

---

---

---

---

---

---

---

## HGN Robustness Study - 2007

- Variations in stimulus speed
  - > Optimal speed center to side = 2 seconds
  - > Slower no effect
  - > Faster = false negative errors
- Manuals also recognize
  - > Prior 45 degrees - Use full 4 seconds, if move too fast may miss it.

---

---

---

---

---

---

---

## Robustness - 2007

- Eye elevation
  - > 1st test period = no significant differences
  - > 2<sup>nd</sup> = errors only resulted in false negatives
  - > Raising eye 4 inches does not engage different eye muscles
- Distance of stimulus to face
  - > Increased distance = did not alter results
  - > Decreased distance = increased accuracy

---

---

---

---

---

---

---

## Robustness - 2007

- Variations in subject's position
  - › Standing, sitting & lying down = no significant differences
  - › Citek found same
- Subjects with vision in only one eye
  - › HGN is reduced in a non-functioning eye
  - › Increased false negatives
  - › No evidence leads to false arrests

---

---

---

---

---

---

---

## Citek Sleep Deprivation Study - 2011

- 2 test sessions
  - › Full night's rest & Awake for at least 24 hours
- Presence & # of validated impairment cues up w/ BAC not w/ lack of sleep
- Sleep deprivation alone does not lead officers to conclude suspect is impaired

---

---

---

---

---

---

---

More Defense  
Ploys

---

---

---

---

---

---

---



### If Officer is not Perfect, FSTs Should be Given No Weight

- Did officer make it easier or tougher?
- Almost nothing officer does will induce signs of impairment
- Use breath/blood test for HGN – officer was correct
- Totality of circumstances
- Use common sense

---

---

---

---

---

---

---

### Can't Give SFSTs if > 65 or bad knees/back

- Original studies indicate may have difficulty doing W&T & OLS (manual mentions)
- Neither say do not give
- Field studies gave to ALL drivers
- Officers trained to take into account
  - > Bring this out in trial/hearing

---

---

---

---

---

---

---

### Can't Give SFSTs if > 65 or bad knees/back

- Use juror's/judge's common sense
- Where is subject having difficulty?
  - > Mental & physical tasks
- Will not impact HGN
- Did suspect complain of physical ailments?

---

---

---

---

---

---

---

## Can't Give SFSTs if > 50 lbs overweight

Only applies to One Leg Stand

[Previous arguments apply]

---

---

---

---

---

---

---

## Can't Give SFSTs if 2 inch heels or greater

- Original studies indicate may have difficulty doing W&T & OLS (manual mentions)
- REMEDY – allow to take shoes off
- Argue poor judgment & impairment
- [Previous arguments]

---

---

---

---

---

---

---

## Must Have Real Line for Walk & Turn

- Manuals say real or imaginary line (ARIDE designated straight line)
- Line impacts very small portion of the test
- Officer's training/experience
- [Previous arguments]

---

---

---

---

---

---

---

The Longer They Blow  
The Higher They Go

---

---

---

---

---

---

---

### DEEP LUNG AIR

The defense challenge

- The deeper the breath, the higher the alcohol concentration
- "The longer they blow the higher they go"

---

---

---

---

---

---

---

### DEEP LUNG AIR

- The deeper the breath, the closer the result to actual alcohol concentration (more accurate).

Flaxmayer – Alcohol and Breath Testing.

- DPS regulations mandate instruments test alveolar air

---

---

---

---

---

---

---

Remember Deep Lung Air  
Is What We Want

---

---

---

---

---

---

---

Too Much Air in the  
Blood Tube

---

---

---

---

---

---

---

### Too Much Air in Blood Tubes

Defense Challenge

- ⦿ The blood tubes are not "full"
- ⦿ Defense arguments:
  - > **May cause inaccurate result**
  - > **May demonstrate an issue with tubes (leak)**
  - > **May let yeast/contaminates enter**
  - > **Proportion of powder to blood is too great**
  - > **Lazy officer**

---

---

---

---

---

---

---

## Too Much Air in Blood Tubes Response

- ◎ Be pro-active
  - › Review lab notes – how full are tubes?
  - › Elicit phlebotomist keeps tube on hub until tube quits filling
  - › Elicit through lab - there was sufficient blood in tube – no concerns

---

---

---

---

---

---

---

## Too Much Air in Blood Tubes Response

- ◎ Too much air would, at most, cause lower result
- ◎ Some labs tests tube with most blood in it
- ◎ Sodium Fluoride kills yeast/prevents fermentation
  - › Refrigeration
  - › Glucose not added to blood
  - › Candida albicans make one very ill

---

---

---

---

---

---

---

**Thank You!**

Beth Barnes  
Arizona GOHS TSRP  
[beth.barnes@phoenix.gov](mailto:beth.barnes@phoenix.gov)



---

---

---

---

---

---

---